

Mah Sing Plastics Industries Sdn Bhd v See Hau Global Sdn Bhd A

HIGH COURT (KUALA LUMPUR) — SUIT NO 22IP-24-08 OF 2013 B
AZIZAH NAWAWI J
4 AUGUST 2015

Patents — Infringement — Allegations of — Claims for invalidation and infringement — Parties involved in business manufacturing, selling and distributing pallets — Defendant issued warning notice in daily paper asserting rights as owner — Claim for exclusive right to manufacture, distribute and to sell wing-shaped pallets in Malaysia — Whether plaintiff aggrieved — Whether there was novelty in design — Whether there was inventive step — Whether there was infringement — Patents Act 1983 C D

The plaintiff and the defendant were in the business of manufacturing, selling and distributing pallets. The defendant is the owner of ‘wing-shaped pallet for handling & storing loads’ (‘MY-055 Patent’), granted under the Patents Act 1983 (‘the Act’) on 28 February 2013 and in force until 27 July 2030. The plaintiff began manufacturing and selling wing-shaped pallets towards the end of 2012. The other manufacturer of plastic pallets was the defendant. On 20 June 2013, the defendant published a warning notice in the daily paper asserting its rights as the owner of MY-055 Patent. With MY-055 Patent, the defendant claimed an exclusive right to manufacture, distribute and to sell wing-shaped pallets in Malaysia. The plaintiff contended that it was aggrieved by this as the plaintiff was prohibited from manufacturing, distributing and selling its wing-shaped pallets in Malaysia, which it had been doing since 2012. Hence, the plaintiff instituted this suit as a pre-emptive measure against any legal actions on infringement in respect of the MY-055 patent and thereby challenging the validity of MY-055 Patent with an additional prayer that the plaintiff’s wing-shaped pallet did not infringe MY-055 Patent. E F G

Held, dismissing the claim with costs: H

- (1) It is trite law that where lack of novelty is raised, it must be shown that the claimed invention had been anticipated in a single document. No two or more documents are allowed to be combined or mosaic together. The plaintiff failed to prove on the balance of probability that one single prior art contained all the special features and their combination as claimed by the defendant in Patent MY-055. What the plaintiff was attempting to do was to mosaic the numerous prior arts relied by the plaintiff in order to show that MY-055 was not novel. This was clearly against the I

- A established principles and as such, the defendant's Patent MY-055 was novel as at 27 July 2010 (see paras 17-18).
- (2) Section 15 of the Act provides that an invention shall be considered as involving an inventive step if such inventive step would not have been obvious to a notional person having ordinary skills in the art. For the purpose of assessing inventive step, the notional person skilled in the art must be unimagined person and without even a scintilla of inventiveness. Since the plaintiff's witnesses were the contributors and inventors of the pallets, they did not fall within the 'unimagined and without even a scintilla of inventiveness' person. The plaintiff's witnesses were skilled persons with high capability and imagination to invent a pallet (see para 21).
- (3) The plaintiff failed to prove on the balance of probability that the registration of the defendant's Patent MY-055 was not in compliance with the Patents Act 1983 and the Patents Regulations 1986. The plaintiff's wing-shaped pallet does not have one of the essential features or integers of the MY-055 Patent, which were the protruding ribs. As such, it did not fall within the scope of the defendant's MY-055 Patent. Therefore, the plaintiff's wing-shaped pallet did not infringe MY-055 Patent (see paras 24 & 38).

[Bahasa Malaysia summary]

- Plaintiff dan defendan menjalankan perniagaan membuat, menjual dan mengedar palet. Defendan ialah pemilik 'wing-shaped pallet for handling & storing loads' ('Paten MY-055'), yang diberikan di bawah Akta Paten 1983 ('Akta tersebut') pada 28 Februari 2013 dan mula berkuat kuasa sehingga 27 Julai 2030. Plaintiff mula membuat dan menjual palet berbentuk sayap di penghujung akhir 2012. Pembuat palet plastik lain adalah defendan. Pada 20 Jun 2013, defendan telah menyiarkan notis amaran dalam akhbar harian menegaskan haknya sebagai pemilik Paten MY-055. Dengan Paten MY-055, defendan menuntut hak eksklusif untuk membuat, mengedar dan menjual palet-palet berbentuk sayap itu di Malaysia. Plaintiff berhujah ia terkilan oleh itu kerana plaintiff dilarang membuat, mengedar dan menjual palet berbentuk sayapnya di Malaysia, yang telah dilakukannya sejak 2012. Justeru, plaintiff telah memulakan guaman ini sebagai langkah-langkah bagi persediaan terhadap apa-apa tindakan undang-undang berhubung pelanggaran berkaitan Paten MY-055 dan dengan itu mencabar kesahan Paten MY-055 dengan permohonan tambahan bahawa palet berbentuk sayap plaintiff tidak melanggar Paten MY-055.

Diputuskan, menolak tuntutan dengan kos:

- (1) Adalah undang-undang lapuk di mana ketiadaan sesuatu yang baru ditimbulkan, ia perlu ditunjukkan bahawa ciptaan yang dituntut telah

dijangkakan dalam satu dokumen sahaja. Tiada dua atau lebih dokumen dibenarkan untuk digabungkan atau dimozekkan bersama. Plaintiff telah gagal membuktikan atas imbalan kebarangkalian bahawa satu seni terdahulu terkandung dalam semua ciri-ciri istimewa dan gabungannya seperti yang dituntut oleh defendan dalam Paten MY-055. Apa yang cuba dilakukan plaintiff adalah untuk menunjukkan bahawa MY-055 adalah tidak baru. Ini jelas bertentangan dengan prinsip-prinsip yang tetap dan oleh itu, Paten MY-055 defendan adalah baru sehingga 27 Julai 2010 (lihat perenggan 17-18).

- (2) Seksyen 15 Akta tersebut memperuntukkan bahawa suatu ciptaan hendaklah dianggap sebagai melibatkan langkah berdaya cipta jika langkah berdaya cipta sedemikian tidak begitu jelas kepada orang bertanggungjawab yang mempunyai kemahiran biasa dalam seni. Bagi tujuan menilai langkah berdaya cipta, orang bertanggungjawab yang mempunyai kemahiran dalam seni hendaklah merupakan orang yang tidak berimajinasi dan tidak langsung mempunyai daya cipta. Oleh kerana saksi-saksi plaintiff merupakan penyumbang dan pelabur palet-palet itu, mereka tidak terangkum dalam maksud orang yang 'unimaginative and without even a scintilla of inventiveness'. Saksi-saksi plaintiff merupakan orang berkemahiran dengan kemampuan dan imaginasi tinggi untuk mencipta palet (lihat perenggan 21).
- (3) Plaintiff telah gagal membuktikan atas imbalan kebarangkalian bahawa pendaftaran Paten MY-055 defendan tidak mematuhi Akta Paten 1983 dan Peraturan-Peraturan Paten 1986. Palet berbentuk sayap plaintiff tidak mempunyai ciri atau bilangan utama Paten MY-055, tulang rusuk yang menonjol. Dengan itu, ia tidak terangkum dalam skop Paten MY-055. Oleh demikian, palet berbentuk sayap plaintiff tidak melanggar Paten MY-055 (lihat perenggan 24 & 38).]

Notes

For cases on infringement in general, see 10(1) *Mallal's Digest* (5th Ed, 2015) paras 1265-1299.

Cases referred to

- Catnic Components Ltd and Another v Hill and Smith Ltd* [1982] RPC 183, HL (refd)
- Ranbaxy (M) Sdn Bhd v El Du Pont Nemours and Co* [2012] 4 MLJ 34; [2011] 1 LNS 16, CA (refd)
- SKB Shutters Manufacturing Sdn Bhd v Seng Kong Shutter Industries Sdn Bhd & Anor* [2011] 2 MLJ 781; [2011] 4 CLJ 93, HC (folld)
- Sanofi-Aventis (Malaysia) Sdn Bhd & Anor v Fresenius Kabi (Malaysia) Sdn Bhd* [2012] 4 CLJ 532, HC (folld)
- Windsurfing International Inc v Tabur Marine (Great Britain) Ltd* [1985] RPC 59, CA (refd)

A Legislation referred to

Patent Act 1983 ss 11, 12, 13, 14, 15, 16, 31(1), 56(2)(a), 58

Timothy Siaw (Raghuram S with him) (Shearn Delamore & Co) for the plaintiff.
YC Phang (YC Pang, Chong & Gordon) for the defendant.

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Azizah Nawawi J:

INTRODUCTION

C

[1] Essentially, the main prayers of the plaintiff's suit against the defendant are as follows:

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(a) a declaration that the defendant's patent 'wing-shaped pallet for handling and storing loads', registration number MY-148055-A ('Patent MY-055') and each and all of the claims is invalid as it is not novel, that it is anticipated by prior arts, does not involve any inventive steps, does not involve any inventive idea, lacks sufficiency and clarity in its descriptions to support the claim (paras 19(a) and (b) of the statement of claim; and

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(b) a declaration that the manufacture, importation, distribution, stocking, supply, sale and/or offering to supply or sell the plaintiff's wing – shaped pallets or any other pallets manufactured by the plaintiff or its licensees or distributors does not constitute any infringement of any and all of the claims of Malaysian Patent MY-055.

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[2] After a full trial, prayer (a) above was dismissed by this court but this court has allowed prayer (b) above. Prayer (b) above was allowed in the following manner:

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The plaintiff is also seeking prayer (c), limited only to its wing shaped pallets, model N4-1311SLW. As this model does not have any protruding ribs around the chamfer area and under the wings, *I will allow prayer (c) limited only to model N4-1311SLW with costs of RM15,000.*

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[3] The plaintiff did not appeal against the said decision, but the defendant filed a notice of appeal which reads as follows:

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... bahawa SEE HAU GLOBAL SDN BHD ... merayu kepada Mahkamah Rayuan terhadap sebahagian keputusan tersebut yang memutuskan bahawa tuntutan Responden/Plaintif di perenggan 19(c) dalam Pernyataan Tuntutan dibenarkan dengan variasi di mana Deklarasi diberikan bahawa segala pengilangan, pengimportan, pengedaran, stok, pembekalan, penjualan dan/atau menawarkan untuk membekalkan atau menjial palet Plaintif dengan model No N4-1311SLW oleh Responden/Plaintif atau pemegang lesennya atau pengedar-pengedar tidak

melanggar mana-mana dan semua tuntutan Paten Malaysia No MY-148055-A, dan kos sebanyak RM15,000 diperintahkan untuk dibayar oleh Perayu/defendan kepada Responden/Plaintif.

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[4] As such, the appeal is limited to the granting of prayer (b) above as pleaded in para 19(c) of the plaintiff's statement of claim ("SOC").

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THE SALIENT FACTS

[5] Both the plaintiff and the defendant are in the business of manufacturing, selling and distributing of pallets.

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[6] The defendant is the owner of the MY-055 Patent which was invented by Cheah Chee Chon ('DW1'), in respect of an invention entitled 'wing-shaped pallet for handling & storing loads'. The MY-055 Patent was granted under the Patents Act 1983 on 28 February 2013 and is in force until 27 July 2030.

D

[7] A brief description of the MY-055 Patent is set out as follows:

The present invention generally relates to a pallet utilised for handling and storing loads. More particularly, a wing-shaped pallet constructed for handling and storing loads including bag-packaged materials in cargo transportation, shipment and logistic services industries.

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[8] There are five claims in the MY-055 Patent. Claim 1 of the MY-055 Patent is a product claim that is directed to a wing-shaped pallet. Claims 2-5 are dependent on claim 1. The claims read as follows:

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CLAIM 1

A wing-shaped pallet (20) for handling and storing loads, comprising of:

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A base (30) characterised by a plurality of vertical structure members connected orthogonally with at least one horizontal support member (33), a plurality of treads on the bottom surface of the horizontal support member (33) for producing friction between said base (30) and a conveying means;

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A planar platform (50) including a bottom surface (53) and a top surface (52) for receiving loads, having greater dimension than the base (30) thereby forming an overhanging area;

A plurality of studs (31) extending perpendicular from base (30) each positioned at every intersection of the vertical structure member (32) and the horizontal support member (33), wherein said studs (31) are coupled to the bottom surface (53) of the planar platform (50);

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A plurality of anti-slip means (60) mounted on the base, the top surface (52) and the bottom surface (53) of planar platform (50);

A Wherein said anti-slip means mounted on the bottom surface of the planar platform (50) provide means for preventing slippage of fork tines;
Wherein the areas in between of the studs (31) form hollow channels (40) with chamfers for receiving fork tines;

B Wherein the chamfers (41) and the overhanging area (51) may further include a protruding ribs (42) to reinforce said planar platform (50) and to guide the entry of the fork tines across the chamfers (41).

CLAIM 2

C A wing-shaped pallet (20) for handling and storing loads according to claim 1 wherein the planar platform (50) for receiving load may include a plurality of cavities.

CLAIM 3

D A wing-shaped pallet (20) for handling and storing loads according to claim 1 wherein the wing-shaped pallet (20) can be made from any material, preferably thermoplastic resin materials.

CLAIM 4

E A wing-shaped pallet (20) for handling and storing according to claim 1 wherein the wing-shaped pallet has high strength to weight ratio.

CLAIM 5

F A wing-shaped pallet (20) for handling and storing loads according to claim 1 wherein the plurality of ribs (42) that protrudes from said chamfers (41) may have variable configurations.

G [9] The plaintiff began manufacturing and selling wing shaped pallets towards the end of 2012. The other manufacturer of plastic pallets is the defendant, See Hau Global Sdn Bhd.

H [10] On 20 June 2013, the defendant had published a warning notice in the Chinese Daily Sin Chew Jit Poh asserting its rights as the owner of the MY-055 Patent. With the said MY-055 Patent, the defendant claimed an exclusive right to manufacture, distribute and to sell wing-shaped pallets in Malaysia.

I [11] The plaintiff contends that it is aggrieved by this as it prohibits the plaintiff from manufacturing, distributing and selling its wing-shaped pallets in Malaysia, which it has been doing since 2012.

[12] The plaintiff institute this suit as a pre-emptive measure against any legal actions on infringement in respect of the MY-055 Patent and thereby challenging the validity of the MY-055 Patent with an additional prayer that the plaintiff's wing shaped pallet does not infringe the MY-055 Patent.

FINDINGS OF THE COURT

A

Issue (i) – Invalidation

[13] Section 56(2)(a) of the Patent Act states that a court shall invalidate the patent if the person requesting the invalidation proves that what is claimed in the patent:

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- (a) is not an invention within the meaning of s 12; or
- (b) is excluded from protection under s 13 or sub-s 31(1); or
- (c) is not patentable because it does not comply with the requirements of ss 11, 14, 15 and 16.

C

[14] With regards to the issue of invalidation, the plaintiff is seeking to invalidate Patent MY-055 on the basis that the said Patent MY-055:

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- (a) is not novel, as it is anticipated by prior arts;
- (b) does not involve any inventive steps, as the invention is obvious to a person having ordinary skill in the art and by having regards to the common general knowledge in the related field;
- (c) does not involve any inventive idea; and
- (d) lacks sufficiency and clarity in its descriptions to support the claim.

E

[15] The first issue raised by the defendant is that from the SOC read with the particulars of objection and/or grounds of invalidation of the Patent MY-055, the only ground of objection raised by the plaintiff is found in para 5.1 of the SOC, pertaining to the wing-shaped pallets. It is the contention of the defendant that the SOC did not plead the issues of novelty or non-obviousness raised in the submission of the plaintiff. Having considered the pleadings, I agree with the defendant that the ground of invalidation is limited to para 5.1 and thus the other issues on novelty or non-obviousness raised in the submission are not the pleaded issues and must therefore be disregarded by this court.

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[16] However, if I am wrong in my findings above, I will now deal with the issues raised by the parties. The first issue is on novelty and it is the submission of the plaintiff that Patent MY-055 is not novel as the features claimed to be new are already part of the common general knowledge and can be found in the prior arts including the Malaysian Standards 445:2010. This is premised on s 14 of the Act which provides that a patent is not new if it is anticipated by a prior art.

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A [17] It is trite law that where lack of novelty is raised, it must be shown that the claimed invention has been anticipated in a single document. No two or more documents are allowed to be combined or mosaic together. In *Sanofi-Aventis (Malaysia) Sdn Bhd & Anor v Fresenius Kabi (Malaysia) Sdn Bhd* [2012] 4 CLJ 532, it was held that where the issue of novelty was raised, it must be shown that the claimed invention has been anticipated in a single document. At p 568, the court held as follows:

C [133] First and foremost, it is trite law that where lack of novelty is raised, it must be shown that the claimed invention has been anticipated in a single document. No two or more documents is allowed to be combined or mosaic together. This entrenched principle has been clearly expressed in numerous cases. The learned authors Lionel Bently and Brad Sherman have put it in this way in *Intellectual Property Law*, (2nd Ed), 2004 at para 3.2.1 of p 449 that:

D *Another important rule of interpretation is that the information must be drawn from a single document. This means that it is not possible to combine together (or mosaic) separate items in prior art.* In a similar vein, it is not normally possible to combine elements from within a single document. (Emphasis added.)

E [18] Premised on this principle, I agree with the defendant that the plaintiff has failed to prove on the balance of probability that one single prior art contains all the special features and their combination as claimed by the defendant in Patent MY-055. I also agree with the defendant that what the plaintiff is attempting to do is to mosaic the numerous prior arts relied by the plaintiff in order to show that MY-055 is not novel. This is clearly against the established principles. As such, I find that the defendant's Patent MY-055 is novel as at 27 July 2010.

G [19] The next issue raised by the plaintiff is on inventive steps. Section 15 of the Act provides that an invention shall be considered as involving an inventive step if such inventive step would not have been obvious to a notional person having ordinary skills in the art. The test for 'obviousness' has been established in the case of *Windsurfing International Inc v Tabur Marine (Great Britain) Ltd* [1985] RPC 59, which held as follows:

- H (i) Firstly, to identify the inventive concept of the claim in question;
- (ii) Secondly, to identify the notional skilled addressee or person skilled in the art and the relevant addressee or person skilled in the art and the relevant common general knowledge of that person;
- I (iii) Thirdly, to identify the differences between the state of the art and the inventive concept of the claimed invention;
- (iv) Fourthly, without the benefit of hindsight, to decide whether the differences identified constitutes obvious steps to the notional person skilled in the art.

[20] With regards to the notional person skilled in the art, Justice Azahar Mohamad said this in *SKB Shutters Manufacturing Sdn Bhd v Seng Kong Shutter Industries Sdn Bhd & Anor* [2011] 2 MLJ 781; [2011] 4 CLJ 93:

At this point, it needs to be made clear that on the issue of the skilled but unimaginative addressee, *it is trite law that such a person is unimaginative and without even a scintilla of inventiveness*. The authority to support this proposition is to be found in the case of *Technograph Printed Circuits Ltd v Mills & Rockley (Electronics) Ltd* [1972] RPC 346 at para 5 of p 355 as follows:

To whom must the invention be obvious? It is not disputed that the *hypothetical addressee is a skilled technician who is well acquainted with workshop technique and who has carefully read the relevant literature*. He is supposed to have an unlimited capacity to assimilate the contents of, it may be, scores of specifications *but to be incapable of a scintilla of invention*. When dealing with obviousness, unlike novelty, it is permissible to make a 'mosaic' out of the relevant documents, but *it must be a mosaic which can be put together by an unimaginative man with no inventive capacity*.

Here I will mention one important point. It must be kept in mind that the 'person skilled in the art' is a legal creation. *This is not real person*. It is worth emphasizing that the question of obviousness is a question solely for this court to determine, hence the requirement for the court to do the mantle of the 'notional skilled addressee' ...

In this regard, learned counsel for the plaintiff pointed out, I think quiet rightly, *that DW3 is a self-admitted inventor, having invented several patents and often from fields which he is not confined to. This clearly shows the somewhat enhanced inventive faculty that is possessed by DW3. This is the reason why I think DW3 does not reflect the characteristic of the non-inventive notional skilled addressee*. This is an important point because it seems to me that the defendant place heavy reliance on the testimony of DW3 on the issue of assessing inventive step. (Emphasis added.)

[21] Premised on *SKB Shutters Manufacturing* case, for the purpose of assessing inventive step, the notional person skilled in the art must be unimaginative person and without even a scintilla of inventiveness. On the facts of the present case, I agree with the submission of the defendant that since the plaintiff's witnesses, PW3 and PW4 are the contributors and inventors of pallets, they do not fall within the 'unimaginative and without even a scintilla of inventiveness' person. The plaintiff's witnesses are skilled persons with high capability and imagination to invent a pallet.

[22] Therefore, this court cannot accept the evidence of the plaintiff's witnesses for the purpose of assessing inventive step as they are not unimaginable skilled persons in the field of pallet design and manufacturing. Something obvious to them might not be obvious to a skilled man with no ability and imagination to invent in the field of art.

- A [23] On the issue of industrially applicable, it is not in dispute that the defendant Patent MY-055 is industrially applicable as the same has been manufactured, marketed and used in Malaysia.
- B [24] Premised on my reasons above, I find that the plaintiff has failed to prove on the balance of probability that the registration of defendant's Patent MY-055 was not in compliance with the Patents Act 1983 and the Patents Regulations 1986.
- C *Issue (ii) – On infringement*
- [25] The second prayer which the plaintiff is seeking for is a declaration that its pallet model N4-1311SLW does not infringe the claims of MY-055 Patent.
- D [26] Infringement of a patent is provided by s 58 of the Patent Act 1983, which reads:
- E Subject to sub section (1), (2) and (3) of section 37 and section 38, an infringement of a patent shall consist of the performance of any act referred to in subsection (3) of section 36 in Malaysia by any person other than the owner of the patent and without the agreement of the latter in relation to a product or a process falling within the scope of protection of the patent.
- F [27] In construing patent claims for infringement purposes, in *Ranbaxy (M) Sdn Bhd v El Du Pont Nemours and Co* [2012] 4 MLJ 34; [2011] 1 LNS 16, Justice Azhar Mohamad (as His Lordship then was) adopted the doctrine of purposive construction developed in the House of Lords decision of *Catnic Components Ltd and Another v Hill and Smith Ltd* [1982] RPC 183.
- G [28] In *Catnic*, Lord Diplock spelled out the doctrine of purposive construction at p 225:
- H To determine whether a claim of a patent has been infringed, he must first discover what is claim. (a) The claim must be construed and analysed to ascertain what are the features – sometimes called the Integers – of the subject matter for which a monopoly is claimed. The claim must be construed in the context of a specification as a whole and in the light of any admissible evidence. (b) It must be read and interpreted as it would be read and interpreted by the notional addressee of the specification, that is to say, a man skilled in the relevant art who has at his disposal the common knowledge in that art at the date of the publication of the specification.
- I When so construed the claim must be analysed to discover what are the several features of the thing for which a monopoly is claimed. One must next consider the alleged infringement to determine whether it infringes the claim. (c) If the alleged infringement of the claim has all the features of the claim it must infringe the claim, even if it also incorporates other features.

[29] For the purpose of our present case, in order to determine whether MY-055 Patent has been infringed, the court will have to ascertain the followings:

- (a) identify the essential features or the integers of the MY-055 Patent; and
- (b) ascertain whether the plaintiff's pallet, model N4-1311SLW falls within the essential features or integers of the MY-055 Patent.

[30] DW1, Cheah Chee Choon is the inventor of the MY-055 Patent. It is the evidence of DW1 that the MY-055 Patent is a combination and embodiment of several essential features including the novel feature which incorporates protruding ribs around the chamfers and the overhanging area of the pallet.

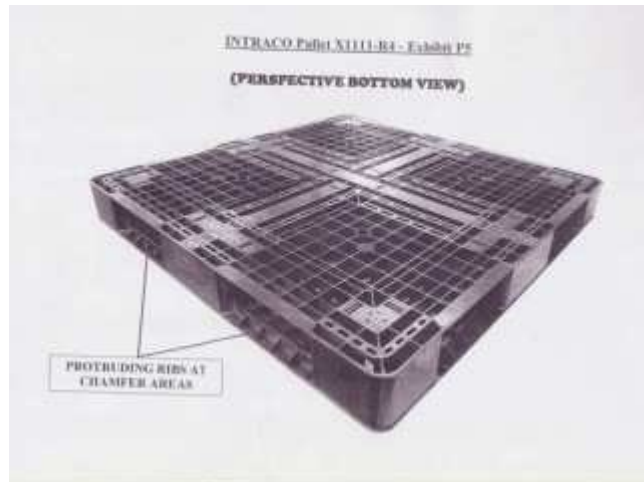
[31] In Q & A 9 of his witness statement, DW1 said that the essential features of his invention are as follows:

In the patent specification, the essential features of my invention which are novel features bear in substance the following descriptions:

- (1) the bottom structure of the wing-shape pallet in the way the vertical and horizontal members are designed to incorporate plurality of treads on the bottom surface of the horizontal support members to permit efficient transportation of the loaded or unloaded of the wing-shaped pallet by the use of a conveying means (refer to page 324, first and second paragraph and page 329 line 8 to 10; also refer to figure 8 of page 337 wherein item 34 clearly marking the treads built into the horizontal members);
- (2) the design of the wing-shaped pallet incorporating a plurality of anti-slip means mounted on the top and bottom of the planner platform as well as, particularly, the base of the wing-shaped pallet to prevent slippage of the pallet during handling and multiple stacking of loads, particularly, bag-products (refer to page 327 line 20 to 30 and page 328 line 1 to 4, page 329 line 19 to 24, page 333 figure 3 clearly illustrating anti-slip means item 60 strategically laid out in line to the horizontal members with plurality of treads underneath the studs);
- (3) the design of the wing-shaped pallet incorporating protruding ribs from the overhanging areas and the surface of the chamfers to reinforce the planar platform and to guide the entry of the fork tines across the chamfers (refer to page 326 line 4 to 12, page 329 line 27 to 30, page 335 figure 6 item 42).

[32] From his evidence, DW1 said that one of the essential features or integers of his invention in MY-055 is the protruding ribs. Under cross-examination, DW1 gave the following evidence:

- A** PC: Okay. I think we'll move on from that. So, you're saying that you have invented protruding ribs around the chamfers, yeah?
- SD1: Yes.
- (see p 115/lines 29 – 30)
- B** PC: It is one of the essential features, is that what you are saying?
- SD1: Yes.
- PC: So, meaning that it must be present and together with the other features to form part of your invention?
- C** SD1: Yes.
- (see p 11/lines 16 – 21)
- PC: ... Okay, and you have identified 3 essential features which are the treads, the protruding ribs and the anti – slip. Is that correct?
- D** SD1: Yes.
- (see p 117/lines 6 – 10)
- E** [33] Under re-examination, SD1 reaffirm his evidence that the protruding ribs is an essential feature of his invention:
- DC: Are there special features in your figure 6 that makes you think that your figure is something so novel?
- F** SD1: The ribs are protruding out of the surface of the pallet. This is like the kangaroo bar of your car, if you install added structure in front of your car, then you will withstand the car from being damaged. So, the protruding ribs is adding in that sense, the first contact with the fork lift tine, so that the fork lift tine will not hit the surface of the pallet and therefore damaging the pallet.
- G** DC: What about those protruding ribs that appears in your overhanging area as well?
- ...
- H** SD1: It is different in the sense that it is protruding out from the pallet surface. Because it is sticking out from the surface, it provides first contact to the fork tines.
- (see p 128/lines 18 – 25 and p 129/ lines 1 – 3)
- I** [34] The protruding ribs can be seen from the following picture of Ex P5, an INTRACO Pallet X1111 – R4 which belonged to the defendant:



[35] SD2 is a patent's examiner with the Intellectual Property Corporation. In his evidence, SD2 also said that the protruding ribs is an essential feature of the MY-055 Patent. Added to that, DW2 also said that to fall within the scope of the defendant's MY-055 Patent, and therefore to infringe the said patent, a pallet must have the 'protruding ribs feature'. At p 137/lines 20–24 of the notes of proceeding, SD2 said this:

PC: Okay. So if a pallet does not have these features – these protruding ribs, then it will not fall within the scope of Claim 1?

SD2: Yes, of course.

PC: Of course. So it is a must feature?

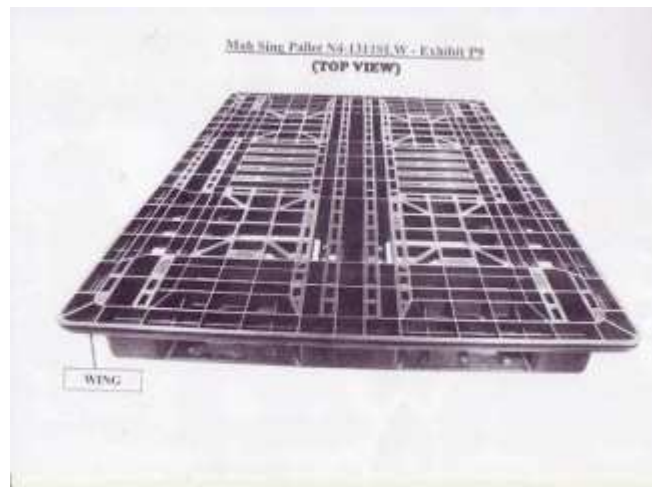
SD2: It's a must.

- A [36] Having considered the evidence before this court, I find that Ex. P9, the plaintiff's wing shaped pallet does not have the 'protruding ribs' as can be seen from the following pictures:

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- I [37] Indeed from the evidence of DW1, he has conceded that there are no protruding ribs in Ex P9:

PC: I would like to refer you to a pallet and ask you about some of its features. Can you confirm that there's no protruding rib here?

J: Exhibit?

PC: P9.

J: That's the wing shaped?

PC: That's the wing shaped pallet, yes. there's no protruding ribs, right?

SD1: I'm not sure if this is considered protruding ribs. But there's no protruding ribs here and here.

(see page 123/lines 1–8)

[38] Having compared the evidences before this court, I agree with the plaintiff that its wing-shaped pallet, Ex P9 does not have one of the essential features or integers of the MY–055 Patent, that is the protruding ribs. As such, Ex P9 does not fall within the scope of the defendant's MY–055 Patent. Therefore, Ex P9 does not infringe the said MY–055 Patent.

CONCLUSION

[39] For the foregoing reasons, I find that the defendant's MY–055 Patent is novel, not obvious or lacking in inventive steps. Thus there is no basis for the plaintiff's claim to invalidate the said patent and the same is dismissed with costs.

[40] At the same time, I find that the plaintiff's wing shape pallet, model N4–1311SLW ('Ex P9') which does not have one of the essential features or integers of MY–055 Patent, the protruding ribs, does not infringe the MY–055 Patent. As such, I will grant the prayer sought by the plaintiff in para 19(c) of the SOC, but limited only to the N4–1311SLW model.

Claim dismissed with costs.

Reported by Afiq Mohamad

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